Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

LOBO GAMING, INC.,

Petitioner,

v.

PIT RIVER TRIBE OF CALIFORNIA,
and PIT RIVER GAMING COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA
THIRD APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should courts resolve issues of tribal sovereign immunity by applying uniform principles of federal law?

2. Under federal law, does the governing body of an Indian tribe have the authority to waive the tribe's sovereign immunity in cases where the governing body is expressly authorized to enter into contracts on the tribe's behalf?

3. Is the Pit River Indian Tribe barred from asserting sovereign immunity from a suit on a contract when the contract was duly authorized and executed by the Tribal Council and the contract itself contains a waiver of the Tribe's immunity from suit?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states that it has no corporate parents and no publicly held company owns 10% or more of Petitioner's stock.

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OPINIONS AND ORDERS BELOW

In May 2000, Petitioner Lobo Gaming, Inc. sued Respondents, the Pit River Indian Tribe and the Pit River Gaming Commission ("Tribe"), in the Shasta County Superior Court of California claiming breach of contract and unjust enrichment. The Superior Court granted the Tribe's Motion to Quash Service of Summons and Complaint on the ground that the Tribe enjoyed sovereign immunity that had not been waived in accordance with tribal law, even though there was a waiver of immunity in the Petitioner's contract with the Tribe. Appendix, pp. 15a-16a. The California Court of Appeals, Third Appellate District, affirmed in *Lobo Gaming, Inc. v. Pit River Tribe of California et al.*, No. C037661, 2002 Cal. App. Unpub. LEXIS 894 (Cal. Ct. App. May 7, 2002). Appendix, pp. 1a-14a.

JURISDICTION

On August 14, 2002, the California Supreme Court entered its order denying discretionary review of the court of appeals' decision. Appendix, p. 17a. This petition for review is timely filed pursuant to Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Article VII §1 of the Pit River Tribal Constitution provides as follows:

> Section 1. Tribal Council. The Tribal Council shall have the following powers:
>
> a. To negotiate, consult and contract with Federal, State and Tribal governments, private enterprises, individuals and other organizations.

* * *

e. To plan and manage all economic affairs and enterprises of the Tribe.

* * *

q. To sue on behalf of the Tribe.

* * *

t. To exercise all powers vested in it by existing law, Tribal traditions and applicable Federal and State law, and such further powers as may be in the future be granted to the Tribal Council by members of the Tribe, the United States or the State of California.

2. Article VII § 3 of the Pit River Tribal Constitution provides as follows:

Section 3. Reserved Powers.

a. To waive the sovereign immunity of the Tribe to unconsented suit; however, no waiver of sovereign immunity shall be made except by a majority of the registered voters voting thereon at a meeting duly called, noticed and convened for that express purpose.

STATEMENT OF THE CASE

This Petition seeks review of important issues of federal law concerning the parameters of tribal sovereign immunity in cases where Indian tribes contract with private businesses. The issues are particularly important in light of the dramatic rise in Indian gaming throughout the United States. This rise has resulted in a simultaneous increase in business

transactions between Indian tribes and the private sector, from large financial institutions to small vendors. The need for uniform law in dealing with the crucial issue of sovereign immunity is important to both private business and the tribes themselves, in order to create a climate of certainty and uniformity and thereby foster economic development where little has previously existed. Such uniform law already exists in the large body of federal case law on sovereign immunity. The Court's resolution of the federal questions presented in this Petition will create a bright line rule to the benefit of future tribal-private sector relations.

In 1996, the Tribe entered into a loan and equipment Lease Agreement ("Agreement") with Petitioner. Under the Agreement, Petitioner loaned the Tribe $800,000 to construct a Class III gaming facility in Burney, California. Petitioner also leased to the Tribe and installed 108 gaming machines in the casino. The Agreement was negotiated, authorized and executed by the Pit River Tribal Council, the Tribe's governing body. The Tribal Council was authorized to negotiate and execute the Agreement pursuant to Article VII §1.a of the Tribal Constitution. The Tribal Council held itself out to Petitioner as having the authority to execute the agreement and be bound by all of its provisions, including the waiver of immunity contained in the Agreement.

By its terms, the Agreement authorized Petitioner to enforce its rights under the Agreement in a court of competent jurisdiction. As part of the inducement to Petitioner to provide the loan and gaming machines, the Tribe expressly agreed to:

> Allow Lessor [Petitioner], for the sole purpose of enforcement of its rights in this agreement, to bring [an] action in a court of competent jurisdiction if Lessor deems

> it necessary to secure its interest. Lessor's remedies will be limited to recovery of its equipment and repayment of the loan referred to above. Tribe agrees to abide by the decision of such court in this matter. Any judgment shall be satisfied only from casino profits and not from any other Tribal assets whatsoever.

The Agreement also recited that it "shall be binding upon and inure to the benefit of the parties and their respective assigns."

Pursuant to the Agreement, Petitioner provided the loan funds and the casino was subsequently constructed and opened in May 1996. Since then, the Tribe has derived a substantial amount of revenue from the gaming machines at the casino. After the casino opened, the Tribe began making lease payments on the machines. However, with the exception of $83,000 in interest payments, the Tribe made no payments on the loan. The Tribe also stopped making lease payments in January 2000, but continued to use and benefit from Petitioner's machines. Since the opening of the casino in May 1996, Petitioner received a total of $1,671,894 in payments from the Tribe, mostly lease payments based on a percentage of revenue from the machines. To date, Petitioner's costs in connection with the Agreement exceed $2 million.

In May 2000, Petitioner sued the Tribe in the Shasta County Superior Court, claiming breach of contract and unjust enrichment. The Superior Court granted the Tribe's Motion to Quash Service of Summons and Complaint on the ground that Petitioner's action was barred by the Tribe's sovereign immunity and that the Tribal Council – although it had the authority to enter into the contract – did not have the authority to waive the Tribe's immunity from a suit on

the contract. Appendix, pp. 15a-16a. To support its ruling, the Superior Court relied on Article VII §3.a of the Tribal Constitution, which provides as follows:

> Section 3. Reserved Powers.
>
> > a. To waive the sovereign immunity of the Tribe to unconsented suit; however, no waiver of sovereign immunity shall be made except by a majority of the registered voters voting thereon at a meeting duly called, noticed and convened for that express purpose.

Petitioner appealed the trial court's decision to the court of appeals in February 2001. After the appellate briefs were filed, the decision in *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 115 Cal. Rptr. 2d 455 (Cal. Ct. App. 2002) was issued. Petitioner filed a supplemental case law letter on the *Smith* decision on January 29, 2002. In addition, at oral argument, Petitioner referred extensively to *Smith* and its analysis of the applicability of uniform federal law and the authority of the Tribal Council to waive sovereign immunity. Appendix, p. 9a n. 1. The California Court of Appeals affirmed the trial court's decision, holding that, under tribal law, the Tribal Council lacked the authority to waive the Tribe's sovereign immunity. Appendix, p. 2a. While acknowledging that the Tribal Council had the authority to enter into contracts with private businesses, the court of appeals held that this did not include the authority to waive the Tribe's sovereign immunity from suit on the contract. The court reasoned that under Article VII § 3.a of the Tribal Constitution, only the general membership had the power to waive the Tribe's sovereign immunity. Appendix, p. 13a. The court of appeals rejected Petitioner's argument that the Tribal Council's authority

to contract included, as a necessary incident thereof, the authority to waive sovereign immunity for suits on the contract. *Id.* The court of appeals also rejected Petitioner's argument that the use of the phrase "unconsented suit" in Article VII §3.a of the Tribal Constitution was a tacit recognition of the Tribal Council's authority to consent to a waiver as part of its power to contract. Appendix, pp. 12a-13a. Relying exclusively on tribal law to determine the Tribal Council's authority, the court of appeals implicitly rejected the Petitioner's argument, based on *Smith*, that the issue of tribal sovereign immunity should be decided by applying uniform federal law.

In June 2002, Petitioner sought review before the Supreme Court of California. In its Petition for Review, Petitioner raised the same three federal questions presented in the present Petition. On August 14, 2002, the California Supreme Court entered its order denying discretionary review of the court of appeals' decision. Appendix, p. 17a.

ARGUMENT

The Rules of the United States Supreme Court provide for discretionary review for "compelling reasons." Sup. Ct. R. 10. The "character of the reasons the Court considers" include situations in which :

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; [and]
>
> (c) a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. The above situations, however, are "neither controlling nor fully measur[e] the Court's discretion." *Id.*

In the present case, the appellate court decision below conflicts with prior decisions of this Court and other federal courts which have resolved questions of federal sovereign immunity according to uniform principles of federal law. The appellate court decision below also diverges from a prior California appellate decision, *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 115 Cal. Rptr. 2d 455 (Cal Ct. App. 2002), which properly applied federal law in determining whether a tribe's sovereign immunity had been authoritatively waived. The specific question of whether a tribal governing body has the power to waive tribal sovereign immunity when that body is authorized to execute contracts on the Tribe's behalf is an important federal question that has not been but should be settled by this Court. All of the above present compelling reasons for this Court's review.

I. THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT, AND IT DID SO IN A MANNER CONFLICTING WITH THE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

The California court of appeals' decision *Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1, 115 Cal. Rptr. 2d 455 (Cal. Ct. App. 2002), addressed a tribal council's authority to waive sovereign immunity in a case where the contract was authorized by the Tribe's governing body. In doing so, *Smith* applied uniform principles of federal law, relying on this Court's recent decision in *C & L Enterprises, Inc. v. Citizen Band Potowatomi Tribe of Oklahoma*, 532 U.S. 411 (2001).

The *Smith* court then held that there was a valid contractual waiver despite the Tribe's claim that the waiver was ineffective under tribal law. The decision to apply uniform federal law in *Smith* is consistent with the fact that federal courts have long resolved general questions of tribal sovereign immunity according to principles of federal, not tribal law.

The issue in *Smith* was whether an arbitration clause contained in an architect agreement between Smith and the Tribe effectuated a valid waiver of the Tribe's immunity from suit on the contract. The court held that, by agreeing to the arbitration clause and to enforcement of an arbitral award "in any court having jurisdiction thereof," the Tribe waived its immunity. *Smith*, 95 Cal. App. 4th at 8, *citing C&L Enterprises, Inc.* As is the case here, the Tribal Council in *Smith* had authorized the agreement as well as the Chairman's signature on the agreement. Significantly, the court in *Smith* rejected the Tribe's argument that the waiver was invalid because it did not comply with the Tribe's sovereign immunity ordinance, which required a separate ordinance or resolution explicitly waiving sovereign immunity. The court began its analysis by stating that the Tribe's argument:

> stands or falls with the proposition that we must apply its tribal sovereign immunity ordinance to find the otherwise binding contract with Smith ineffective to waive sovereign immunity, because the explicit waiver was made by contract, instead of pursuant to a tribal ordinance or resolution. We decline to do so for several reasons.

Smith, 95 Cal. App. 4th at 9.

The second of the several reasons given by the *Smith* court is particularly important in terms of the case at bar:

> [W]e question the premise that the issue whether the Tribe has waived its sovereign immunity by entering into this contract should be determined by reference to a tribal law. Although there are, no doubt, some substantive differences between tribal sovereign immunity and the law applicable to waiver of immunity by foreign sovereigns, the court in *C & L Enterprises, supra*, 532 U.S. 411, 121 S.Ct. 1589-1595, fn. 3 observed that reference to uniform federal law governing the waiver of immunities by foreign sovereigns is appropriate in deciding whether a particular act constitutes a waiver of tribal immunity. Therefore, in reaching its conclusion that the Potawatomi Tribe had waived its sovereign immunity by entering into a contract with the arbitration and choice of law clause, the Court observed that, " '[u]nder the law of the United States ... an agreement to arbitrate is a waiver of immunity ....' Restatement (Third) of the Foreign Relations Law of the United States § 456(2)(b)(ii)(1987)." (*Id.* at p. 1595, fn. 3.) We conclude that, where, as here, the person negotiating and signing the contract is authorized to do so, and the Tribal Council approves the contract, the question whether that act constitutes a waiver is one of federal law. Under federal law, "[w]hen a person has authority to sign an agreement on behalf of a state, it is assumed that the authority

> extends to a waiver of immunity contained in the agreement." (Rest.3d Foreign Relations Law of the United States (1987) § 456, com. B.) As we have explained, although the Tribe couches its argument in terms of whether Sigala [the Chairperson] had actual authority to agree to the contract terms, the declarations establish that, she *did* have this authority, and moreover, that the Tribal Council, fully aware of its terms, approved of the contract by resolution.

Smith, 95 Cal. App. 4th at 10 (emphasis added)(footnote omitted).

Thus, the *Smith* court made two significant rulings. One, that the question of whether tribal immunity has been waived by contract is a question of federal, not tribal law, and two, that under federal law when a person is authorized to sign an agreement on behalf of the tribe, it is assumed that the authority extends to the waiver contained in the agreement. *Id.* The *Smith* court also indicated that uniform federal law should be applied to the question of the Council's or Chairman's authority to enter into an agreement. *Smith*, 95 Cal. App. 4th at 10, n.9, *citing Aquamar v. Del Monte Fresh Produce*, 179 F.3d 1279, 1294 n. 36 (11th Cir. 1999).

In contrast to *Smith*, the court below held that the waiver of immunity contained in Petitioner's agreement with the Tribe was invalid because the Tribal Council lacked the authority to waive sovereign immunity, even though the Council had the constitutional authority to negotiate and execute the contract. In making this determination, the court looked exclusively at tribal law, *i.e.*, Article VII § 3.a of the Tribal Constitution. Had the court applied the same uniform principles of federal law relied on in *Smith*, it

would have reached a different result. This Court should grant review to resolve the inconsistency between *Smith* and the case at bar, and determine both whether the issue of the Tribe's waiver of its immunity by contract should be resolved by the application of uniform federal law and whether the waiver was valid under federal law.

Substantial federal case law establishes that tribal sovereign immunity is "coextensive with the sovereign immunity of the federal government." *Evans v. McKay*, 869 F.2d 1341, 1345 (9th Cir. 1989); *Wyandotte Nation v. City of Kansas City*, 200 F. Supp. 2d 1279, 1285 (D. Kan. 2002); *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319-320 (10th Cir. 1982) *citing* various cases including *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982); *Sekaquaptewa v. MacDonald*, 619 F.2d 801, 808 (9th Cir. 1980), *cert. denied*, 449 U.S. 1010 (1980); *Hamilton v. Nakai*, 453 F.2d 152, 158-59 (9th Cir. 1971). The term "coextensive" is defined as "having the same limits, boundaries, or scope." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4th Ed. (2000). It therefore makes sense to resolve issues of tribal sovereign immunity by application of uniform federal law rather than looking to the peculiarities of each tribe's local laws, which in many cases are difficult to find.

Because tribal sovereign immunity is coextensive with the immunity of the United States, federal courts have ruled that tribal sovereign immunity is subject to the same general limitations. For example, in *Wyandotte supra*, the federal district court faced the issue of whether the Tribe, by filing a quiet title action, had waived its sovereign immunity as to counterclaims for quiet title and equitable recoupment. The court concluded that, "[b]ecause tribal sovereign immunity is

generally coextensive with that of the United States, tribes may waive sovereign immunity as to claims brought in recoupment against actions brought by the tribe," *Id.* at 1285, *quoting Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344-45 (10th Cir. 1982). The *Wyandotte* court applied uniform principles of federal law to reach this conclusion. *Id.* at 1285, *citing Jicarilla*, 687 F.2d at 1344; *Frederick v. U.S.*, 386 F.2d 481, 488 (5th Cir. 1967); *FDIC v. Hulsey*, 22 F.3d 1472, 1487 (10th Cir. 1994).

By contrast, the court below relied exclusively on the limitations contained in tribal law to find that the contractual waiver of immunity was invalid. Following the lower court's reasoning, Article VII § 3.a of the Pit River Tribal Constitution would prohibit a counterclaim of the type recognized in *Wyandotte, supra.* In other words, the peculiarities in tribal law would trump the federal limitations on tribal sovereign immunity recognized in *Wyandotte* and cases like it. Under Article VII § 1.q of the Tribal Constitution, the Pit River Tribal Council has the express constitutional power to sue on behalf of the Tribe. Following *Wyandotte* and the cases cited therein, a suit by the Pit River Tribal Council on behalf of the Tribe would automatically waive the Tribe's immunity with respect to a defendant's recoupment counterclaims without the necessity of a tribal General Membership vote under the reserved powers clause of Article VII § 3.a. The lower court's decision conflicts with *Wyandotte* and cases like it that recognize federal law limits on tribal sovereign immunity.

Federal law principles also establish that if an agency or instrumentality of the United States, acting within the scope of its authority, enters into a contract and thereby binds the United States as principal, the federal government is considered to have waived its sovereign immunity from suit on the contract. *See e.g.*,

Porter v. U.S., 496 F.2d 583, 587 (Ct. Cl. 1974), *cert. denied*, 420 U.S. 1004 (1975), *citing National State Bank of Newark v. U.S.*, 357 F.2d 704, 706 (Ct. Cl. 1966). Federal courts have also found that the power of a tribe's governing body to waive sovereign immunity may be inherent within another enumerated power bestowed upon the governing body, such as the power to contract. *See e.g., Namekagon Dev. Co., Inc. v. Bois Forte Reservation Housing Authority*, 395 F.Supp. 23, 27-28 (D. Mn. 1974)(finding that the Tribal Council's power to waive a tribal corporation's sovereign immunity was inherent in its power to establish the corporation, and rejecting the argument that the power to waive sovereign immunity was reserved to the Tribal membership), *aff'd*, 517 F.2d 508 (8th Cir. 1975). The Court should grant *certiorari* to resolve the conflict between the lower court's analysis and the foregoing cases, and determine whether the foregoing principles should be applied in the context of this case, where the Tribal Council agreed to waive the Tribe's immunity in a contract that the Council was authorized to execute.

The decision below in this case is also inconsistent with federal law principles governing the waiver of a state's Eleventh Amendment immunity.[1] For example, in *In re Innes*, 184 F.3d 1275 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000), the Tenth Circuit reviewed Kansas enabling legislation which authorized a state university to contract with third parties. At issue was the validity of an immunity waiver contained in a

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[1] Although tribal sovereign immunity may not be precisely congruent with that of states, similar principles have been applied to both. *See e.g., Osage Tribal Council v. United States Department of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999)(while explicitly conceding differences between state and tribal immunity, court "takes . . . cue from the decisions addressing waivers of Eleventh Amendment state sovereign immunity" in ruling on issue of whether tribal immunity was waived), *cert. denied*, 530 U.S. 1229 (2000).

contract entered into by the university. The court rejected the argument that the university lacked the authority to waive the State's immunity:

> Nothing in the statute itself makes entering into a contract waiving immunity an *ultra vires* act. Indeed the contrary is true – this legislation explicitly gives KSU, as a state education institution, expansive unlimited authority to contract with the DOE so that KSU may participate in student financial assistance programs. Further, unlike in other Kansas statutes, there is no provision in [the statute] disclaiming a waiver or prohibiting consent to waive . . . . Accordingly, we hold that [the enabling statute] conferred upon KSU the power to waive Eleventh Amendment immunity.

In re Innes, 184 F.2d at 1284 (emphasis added); *accord*, *In re Magnolia Venture Capital Corp.*, 218 B.R. 843, 849-50 (S.D. Miss. 1997).

The question of whether an Indian tribe's legislative body, in this case the Pit River Tribal Council, has the authority to waive tribal sovereign immunity in cases where it has the authority to contract, has never been addressed by this Court. There are, nevertheless, analogous federal Indian law cases which support the proposition that a tribal council's authority to enter into contracts includes the authorization to waive sovereign immunity. Specifically, one federal court has ruled that "'it is repugnant to the American theory of sovereignty that an instrument of the sovereign shall have all the advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and able to contract with others, or to injure others, confident that no redress may be had against it as a matter of right.'"

Namekagon Development Co., Inc., supra, 395 F. Supp. at 29, *citing Federal Sugar Refining Co. v. United State Sugar Equalization Bd.*, 268 F. 575, 587 (S.D.N.Y. 1920), *aff'd*, 517 F.2d 508 (8th Cir. 1975); *accord, Southwest Forest Industries v. Hupa (Hoopa) Timber Corp.*, 151 Cal. App. 3d 239 (Cal. Ct. App. 1984).[2]

The reasoning above should apply to the facts of this case: nothing in the Pit River Tribal Constitution makes the Tribal Council's entering a contract waiving immunity an *ultra vires* act and the Tribal Constitution gives the Tribal Council express authority "to contract with Federal, State and Tribal governments, private enterprises, individuals and other organizations." Article VII § 1.a. In order for this authority to be meaningful, the power of the Tribal Council to contract must necessarily include the power to agree to binding and enforceable remedies, including a limited waiver of sovereign immunity to allow the other party to obtain relief for breach of contract. Otherwise, there is no mutuality of obligation, and the Tribal Council's authority to contract becomes illusory. *See e.g., Mattei v. Hopper*, 51 Cal. 2d 119, 122, 330 P.2d 625, 626 (1958)("Without . . . mutuality of obligation, [an] agreement lacks consideration and no enforceable contract has been created. . . . [o]r, if one of the promises leaves a party free to perform or to withdraw from the agreement at his own unrestricted pleasure, the promise is deemed illusory and it provides no consideration.") In order to be meaningful, and under the general presumption that contracts are "fair and regular," (*see* Cal. Civ. Code § 3545), the Tribal Council's express power to enter into contracts would necessarily require not only an intent that valid contracts be entered

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[2] *Southwest Forest Industries* is an unpublished case that is not citable as precedent in California courts. The court addressed the issue of tribal sovereign immunity in a context analogous to the present case and consistent with Petitioner's position.

into, but that the contract is one that can be enforced so as to create mutuality of obligation and give the other party the benefit of its bargain. In other words, if the Tribal Council has the constitutional authority to enter into contracts and manage the economic affairs of the Tribe, then it must necessarily include, as a matter of law, the authority to agree to enforceable remedies contained within the contract in order to allow the other party meaningful redress in the event of its breach.

The appellate court's failure to recognize and apply uniform federal law principles impermissibly extends the scope of an Indian tribe's sovereign immunity past that of the United States. This Court should grant the Petition to consider the important question of whether to adopt a uniform federal rule that, where a tribe's governing body is authorized to enter into contracts, that authority includes the authority to waive the tribe's sovereign immunity.

II. THIS COURT SHOULD GRANT THE PETITION TO DETERMINE THAT, AS A MATTER OF FEDERAL LAW, A TRIBAL GOVERNING BODY THAT IS EXPRESSLY AUTHORIZED TO EXECUTE A CONTRACT, ALSO HAS THE POWER TO WAIVE THE TRIBE'S SOVEREIGN IMMUNITY IN THE CONTRACT.

This Court has never previously addressed the specific question of whether a tribal governing body – such as the Pit River Tribal Council – has the power to waive tribal sovereign immunity when that body is authorized to execute contracts on the tribe's behalf. The question is an important federal question and needs a uniform answer. This Court should adopt a bright line rule requiring the application of uniform federal law principles to resolve issues of tribal sovereign immunity. This Court should also adopt a bright line rule that, as a

matter of federal law, when a tribal governing body has the express authority to execute a contract, it also has the power to waive the tribe's sovereign immunity from a suit on that contract.

This Court has recognized that the doctrine of tribal sovereign immunity is grounded in the common law. *See e.g., Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1977)(court describes tribal immunity as "the common-law immunity from suit traditionally enjoyed by sovereign powers"); *see also, Turner v. Martire*, 82 Cal. App. 4th 1042, 1048 (Cal. Ct. App. 2000)(" Tribal immunity emanates from the common law"); *TTEA v. Isleta del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999)(court outlines parameters of the "federal common law doctrine of tribal sovereign immunity.") A rule requiring a tribal governing body to be bound by its waiver of immunity in a contract that it is authorized to execute would be firmly grounded in the common law requirements for fairness, mutuality of obligation in contracting, and due process.

In contexts analogous to the present case, courts have repeatedly emphasized such requirements. For example, in *Dade County v. American Re-Insurance Co.*, 467 So.2d 414 (Fla. Dist. Ct. App. 1985), the court rejected an argument similar to one adopted by the court of appeals in this case, holding that where the county was authorized by law to enter into an indemnity insurance contract, it could not assert sovereign immunity in an action brought under the contract. In equating a legislative body's power to contract with the power to waive the government's sovereign immunity from suit on the contract, the court reasoned:

> Under basic hornbook law, in order to be valid, a contract must be mutually enforceable. In accord with this principle, the [Florida] Supreme Court has recently held that sovereign immunity is not a valid defense to a breach of contract action brought against the state where the state has legal authority to enter the contract. Accordingly, the defense of sovereign immunity will not protect [Dade County] from American's counterclaim for Dade's breach of the insurance contract.

Dade, 467 So.2d at 418, *citing Pan-Am Tobacco Corp. v. Dept. of Corrections*, 471 So.2d 4, 5 (Fla. 1984); *accord*, *Parker v. State Board of Regents*, 724 So.2d 163, 169 (Fla. Ct. App. 1998).

Other state courts are in agreement. *See e.g.*, *Wiecking v. Allied Medical Supply Corp.*, 391 S.E.2d 258, 261 (Va. 1990)("the doctrine of sovereign immunity has no application in actions based upon valid contracts entered into by duly authorized agents of the government"); *Architectural Woods, Inc. v. Washington*, 598 P.2d 1372, 1375 (Wash. 1979)(by the act of entering into a contract which the government is authorized to make, the government cannot thereafter assert sovereign immunity as a defense to an action for its breach); *Smith v. State*, 222 S.E.2d 412, 423 (N.C. 1976)(because employee's suit was predicated upon a contract fully authorized by the legislature, the State consented to be sued for breach of the contract); *Ace Flying Service, Inc. v. Colorado Dept. of Agriculture*, 314 P.2d 278, 280 (Colo. 1957)(when a state enters into authorized contractual relations, it cannot later claim sovereign immunity in a suit for its breach).

In *Smith v. State, supra*, the court looked explicitly to the following common law requirements for equity, fairness and due process:

> To deny the party who has performed his obligation under a contract the right to sue the state when it defaults is to take his property without compensation and thus to deny him due process; . . . To hold that the state may arbitrarily avoid its obligation under a contract after having induced the other party to change his position or to expend time and money in the performance of his obligations, or in preparing to perform them, would be judicial sanction of the highest type of governmental tyranny; . . . To attribute to the General Assembly the intent to retain to the state the right . . . to breach its obligation at the expense of its citizens imputes to that body "bad faith and shoddiness" foreign to a democratic government; . . . . A citizen's petition to the legislature for relief from the state's breach of contract is an unsatisfactory and frequently a totally inadequate remedy for an injured party; and . . . The courts are a proper forum in which claims against the state may be presented and decided upon known principles.

Smith v. State, 222 S.E.2d at 423.

In this case, the appellate court's interpretation of the Pit River Tribal Constitution failed to give the Tribal Council authority to agree to appropriate and enforceable remedies when it contracts and is therefore contrary to these common law requirements for fairness, mutuality of obligation in contracting, and due

process of law. This Court spoke decisively to the issue in *Murray v. City of Charleston*, 96 U.S. 432, 445 (1878):

> The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.

(emphasis added).

This common law reasoning was subsequently summarized by the Supreme Court of Virginia in a concise analysis of the various cases addressing the issue:

> [W]hen the state contracts for goods or services, receives the benefit of the contract, and then refuses to honor its obligations, the contractor's property is subjected to an unconstitutional taking without just compensation; a denial of liability under such circumstances also violates state and federal due-process guarantees; to hold that the state may enter into a valid contract and yet retain the power to avoid its obligation would entail an obvious contradiction; neither the state nor the contractor can be bound,

> yet not bound, by a single contract, the courts will not attribute to the legislature any intention to permit the government to exercise bad faith and shoddy dealing, and relegating the injured party to an appeal for justice to the legislature in the form of a private bill for relief is to offer a doubtful remedy,
>
> . . .
>
> The reasoning of the foregoing cases is virtually undisputed among the authorities which have considered the immunity question, and we find it persuasive.

Wiecking, *supra*, 391 S.E.2d at 260 (citations and quotations omitted).[3]

Of course, Petitioner recognizes the principle enunciated by this Court, that, as sovereign governmental entities, Indian tribes enjoy sovereign immunity from suits on contracts except where Congress has authorized the suit or the tribe has clearly waived its immunity, whether the contracts involve governmental or commercial activities, and whether the contracts were made on or off a reservation. This principle was made clear in *Kiowa Tribe v.*

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[3] Like all federally recognized Indian tribes, the Pit River Tribe is bound by the Indian Civil Rights Act, 25 U.S.C. § 1302, including the provisions therein prohibiting the Tribe from taking a person's property without just compensation and depriving a person of property without due process of law. The Tribe's obligations under the Indian Civil Rights Act are incorporated in Article IV of the Tribal Constitution. The argument that the Tribal Council, though admittedly possessing the authority to enter into contracts, has no authority to authorize remedies for its breach in the form of a contractual waiver of immunity, is contrary to the Act's takings clause and due process clause, 25 U.S.C. §1302(5) and (8), as the court recognized in *Wiecking*.

Manufacturing Technologies, Inc., 523 U.S. 751, 754, 760 (1998). However, Petitioner has never argued below – and does not argue now – that a tribe waives sovereign immunity merely by entering a contract. The contract at issue in *Kiowa* did not contain a waiver of tribal sovereign immunity. By contrast, the Agreement in this case contains a clear contractual waiver of the Tribe's immunity.[4] *See* Statement of the Case *supra*. Thus, the question presented to this Court is a narrower one than the one presented in *Kiowa*: Does the Tribal Council's authority to enter into contracts inherently include the authority to waive sovereign immunity from a suit on the contract? If the answer to that question is yes, then the waiver of immunity contained in Petitioner's contract with the Tribe is valid. The reasoning of the cases cited above is applicable to the facts of this case because the cases support one basic principle: a governing body's constitutional power to contract must necessarily include the power to waive its immunity from a suit on the contract. While the *Smith* court and other courts have recognized this principle, the court below in the case at bar did not.

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[4] This Court set forth the requisite standard for waivers of tribal sovereign immunity in *C&L Enterprises, Inc.*, 532 U.S. at 418 ("to relinquish its immunity, a tribe's waiver must be 'clear'").

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Petitioner, Lobo Gaming, Inc., requests that this Court GRANT its Petition for a Writ of Certiorari.

Respectfully submitted this 12th day of November, 2002.

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C037661

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

LOBO GAMING, INC., Plaintiff and Appellant,

v.

PIT RIVER TRIBE OF CALIFORNIA et al., Defendants and Respondents.

May 7, 2002, Filed

NOTICE:
[*1] NOT TO BE PUBLISHED CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR PURPOSES OF RULE 977.

JUDGES:
RAYE, J. We concur: DAVIS, Acting P.J., MORRISON, J.

OPINIONBY:
RAYE

OPINION:

Indian tribes enjoy sovereign immunity "from suits on contracts, whether those contracts involve governmental or commercial activities and whether they

were made on or off a reservation." (*Kiowa Tribe v. Manufacturing Tech. (1998) 523 U.S. 751, 760 [140 L. Ed. 2d 981, 988, 118 S. Ct. 1700]* (*Kiowa*).) In this appeal challenging the contours and implications of sovereign immunity, plaintiff Lobo Gaming, Inc. contends the Pit River Tribe of California (Tribe) contractually waived its immunity. We disagree. The Constitution of the Pit River Tribe (Tribal Constitution) and state and federal precedent support the Tribe's notion that the Pit River Tribal Council (Tribal Council) did not have the authority to waive immunity without the consent of the tribal **[*2]** membership and such authority is not implicit in the Tribal Council's power to contract. We, therefore, affirm the order granting the Tribe's motion to quash the service of summons.

FACTS

Pursuant to an equipment lease agreement executed in March 1996, the Tribal Council borrowed funds from Lobo Gaming to construct two casinos on its reservation in Shasta County and to lease gaming machines and furnishings. The Tribe is governed by the Tribal Constitution. Article VII, section 1 confers on the Tribal Council the power to "negotiate, consult and contract with Federal, State and Tribal governments, private enterprises, individuals and other organizations." (Tribal Constitution, Art. VII, § 1.)

The Tribal Constitution expressly reserves to the Tribe the power to waive sovereign immunity. Article VII, section 3, entitled "Reserved Powers," states in pertinent part: "To waive the sovereign immunity of the Tribe to unconsented suit; however, no waiver of sovereign immunity shall be made except by a majority of the registered voters voting thereon at a meeting duly called, noticed and convened for that express purpose."

Nevertheless, the equipment lease purports to waive the [*3] Tribe's sovereign immunity. It states that the Tribe will "allow Lessor, for the sole purpose of enforcement of its rights in this agreement, to bring action in a court of competent jurisdiction if Lessor deems it necessary to secure its interest. Lessor's remedies will be limited to recovery of its equipment and repayment of the loan referred to above. Tribe agrees to abide by the decision of such court in this matter. Any judgment shall be satisfied only from casino profits and not from any other Tribal assets whatsoever." The Tribal Council approved the agreement, but the tribal membership did not. It is undisputed that the registered voters of the Tribe never voted on, and never approved, the agreement, nor did they vote on or approve any proposal for the Tribe to waive its sovereign immunity.

Disagreements developed between the parties over the terms of their agreement. On May 8, 2000, Lobo Gaming sued in Shasta County Superior Court. The Tribe, which had previously filed a federal action challenging the validity of the agreement under section 81 of title 25 of the United States Code, removed the case to federal district court. The district court subsequently granted summary [*4] judgment in favor of Lobo Gaming on the Tribe's federal action and remanded the present case to Shasta County Superior Court without addressing the issues raised therein. On remand, the Tribe moved to quash service of summons on grounds of sovereign immunity. The trial court granted the motion and this appeal followed.

DISCUSSION

No one disputes that the Tribe enjoys sovereign immunity. We need not, therefore, reiterate the basic principles of sovereign immunity, other than to

emphasize there are far- reaching implications of the doctrine for those who choose to do business with Indian tribes. (*Kiowa, supra,* 523 U.S. at p. 754-755; *Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 58 [56 L. Ed. 2d 106, 115, 98 S. Ct. 1670]; Puyallup Tribe v. Washington Game Department (1977) 433 U.S. 165, 172-173 [53 L. Ed. 2d 667, 674, 97 S. Ct. 2616]* (*Puyallup*); *Oklahoma Tax Com. v. Potawatomi Tribe (1991) 498 U.S. 505, 509-510 [112 L. Ed. 2d 1112, 1119-1120, 111 S. Ct. 905]* (*Oklahoma Tax Com.*).) In bringing the motion to quash service, the Tribe contends the trial court lacks subject matter jurisdiction because **[*5]** of the Tribe's sovereign immunity. Lobo Gaming insists the Tribe contractually waived its immunity. To relinquish its immunity, a tribe's waiver must be "'clear.'" (*C & L Enterprises v. Citizen Band (2001) 532 U.S. 411, 418 [149 L. Ed. 2d 623, 631, 121 S. Ct. 1589]* (*C & L Enterprises*).)

Both sides seem to agree that to be "clear," a relinquishment must be express. But while the Tribe claims the Tribal Council has no "express" constitutional authority to waive immunity, Lobo Gaming insists the authority to waive immunity is part of its "express" power to contract. The authority to contract, Lobo Gaming argues, is a nullity without the authority to provide enforceable remedies. In the battle over what is express and what is implied, we must construe the language of the Tribal Constitution and resist the seductive temptation to consider either the equities or the expectations of the parties. We reject any implication by the Tribe that we, as a state court, cannot interpret a tribal Constitution. (See, e.g., *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council (1985) 170 Cal. App. 3d 489, 216 Cal. Rptr. 59* (*Hydrothermal*).)

The [*6] Tribe provides a plethora of cases involving the application of sovereign immunity to contractual disputes. We find two cases particularly compelling because of the factual similarities. In *World Touch Gaming v. Massena Management, LLC (N.D.N.Y. 2000) 117 F. Supp. 2d 271* (*World Touch Gaming*), the tribe delegated authority to operate its casino to a management company pursuant to a management agreement. The agreement gave the management company the authority to "construct, manage, administer, operate, maintain and improve the gaming facilities ... [and] such other activities as are reasonably related thereto." (*Id. at p. 273, fn. 2.)* The senior vice president of the management company signed the lease and sales agreements as the managing agent of the casino. The sales agreement provided: "Notwithstanding the aforementioned Tribal Sovereignty the Tribe agrees to submit to the jurisdiction of the state and federal courts for the sole and limited purpose of enforcement of the obligations under this contract ...." (*Id. at p. 273.)*

World Touch Gaming, like Lobo Gaming, asserted that the explicit language in the agreement waived [*7] the tribe's sovereign immunity insofar as the breach of contract claim was concerned. The court disagreed. "According to the unequivocal language of the Tribe's Constitution and Civil Judicial Code, only the Tribal Council can waive the Tribe's sovereign immunity, and such waiver must be express. The Tribal Council did not authorize [the senior vice president] to waive sovereign immunity, nor did the Tribal Council expressly waive the Tribe's sovereign immunity. [Citation.] Thus, the Tribe's sovereign immunity was not waived, and it is immune from suit." (*World Touch Gaming, supra*, 117 F. Supp. 2d at p. 275.) The court rejected World Touch's contention that the provision in the management agreement giving exclusive control over the day-to-day

operations of the casino was an authorization to waive the tribe's sovereign immunity.

Danka Funding Co. v. Sky City Casino (1999) 329 N.J. Super. 357, 747 A.2d 837 (*Danka Funding*) also involves a casino on an Indian reservation. Danka Funding entered into two lease agreements with the Pueblo of Acoma, a federally recognized Indian tribe. The lease form contained a so-called "forum selection clause," whereby the **[*8]** tribe consented to the jurisdiction of "any local, state or federal court" and the application of the law of the state in which the lease processing center is located. (*Id.* at p. 840.) The comptroller of the casino signed the agreements on behalf of the tribe. The tribe, as here, contended that the comptroller did not have authority under tribal law to waive immunity. (*Id.* at p. 841.)

In *Danka Funding, supra, 747 A.2d 837,* the tribe's laws protected its sovereign immunity to the maximum extent possible and explicitly stated what procedures had to be followed in order to waive immunity. (*Id.* at pp. 841-842.) Unlike the Tribal Council here, the Acoma Pueblo Tribal Council "has the power to waive the sovereign immunity of the Pueblo of ACOMA or by resolution, to authorize the Governor or his designate to waive the sovereign immunity of the Pueblo of ACOMA as limited in the resolution." (*Ibid.*) But the comptroller, not the council, purportedly waived the tribe's immunity by executing the lease form containing the forum selection clause. Such a waiver, according to the appellate court, was ineffective.

The court concluded: "The requirement that the **[*9]** waiver be 'clear' and 'unequivocally expressed' is not something that may be flexibly applied or even disregarded based on the parties or the specific facts involved. *Ute Distribution Corp. v. Ute Indian Tribe, 149 F.3d 1260, 1267 (10th Cir. 1998).* 'In the absence

of a clearly expressed waiver by either the tribe or Congress, the Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case.' *Ute Distribution Corp., 149 F.3d at 1267.*" (*Danka Funding, supra*, 747 A.2d at p. 841.)

Hence, in both *World Touch Gaming* and *Danka Funding*, the business enterprises were unable to pursue their breach of contract claims against the tribes. The courts did not have subject matter jurisdiction because those who purported to waive the tribes' immunity were without authority under the Constitutions and laws of the tribes. In each case, the court warned the sophisticated defendants of the implications of their carelessness. In *World Touch Gaming*, the court concluded: "Moreover, as a sophisticated distributor of gaming equipment **[*10]** that frequently deals with Indian gaming enterprises, World Touch should have beer. careful to assure that either the Management Company had the express authority of the Tribe to waive sovereign immunity, or that the Tribe itself expressly waived sovereign immunity with respect to the Sales and Lease Agreements. [Fn. omitted.] World Touch is not a novice in matters relating to Indian gaming enterprises and Indian sovereign immunity, and cannot now rely upon naivete to expand the reading of the Management Agreement to encompass authority to waive sovereign immunity." (*World Touch Gaming, supra*, 117 F. Supp. 2d at pp. 275-276.)

In *Danka Funding*, the court echoed the same admonishment: "Danka Business Services knew it was dealing with an Indian tribe and is charged with knowledge that the tribe possessed sovereign immunity. The tribe, through its laws, describes how one may

obtain a legally enforceable waiver of that immunity. Neither Danka Business Services nor Danka Funding took advantage of those provisions." (*Danka Funding, supra*, 747 A.2d at p. 842.)

A steady stream of Supreme Court cases on the sanctity of an Indian tribe's sovereign immunity, supplemented **[*11]** by cases such as these in which sovereign immunity is not waived when the means and procedures contravene the tribes' own laws, supports the Tribe's assertion that it had not legally waived its immunity. Lobo Gaming's plea for equitable relief is unavailing. It, too, is a gaming company, presumably sophisticated, and charged with the knowledge that the Tribe possesses sovereign immunity.

But Lobo Gaming insists that a more recent Supreme Court case, *C & L Enterprises*, *supra*, 532 U.S. 411, provides a more favorable standard for the resolution of business disputes with Indian tribes. While *C & L Enterprises* certainly upheld the validity of a tribe's agreement to arbitrate, and hence bodes well for alternative dispute resolution mechanisms if properly authorized and executed, it has no bearing on a case such as this, where the purported waiver contravened the Tribe's Constitution. There was no contention that the form contract, which was proposed by the tribe itself, was not authorized, nor was there any suggestion or hint that whoever approved and executed the agreement did so improperly. Quite simply, the dispositive question raised in this case, whether the power to contract **[*12]** includes the power to waive immunity, was not at issue in *C & L Enterprises*, and the holding, therefore, bears no relevance to the case at hand. **n1**

n1 Similarly, *Smith v. Hopland Band of Pomo Indians (2002) 95 Cal.App.4th 1* (*Smith*), cited at oral argument by counsel for Lobo Gaming as a case expanding the holding of *C & L Enterprises*, is also inapposite. In *Smith*, the court held sovereign immunity was waived by execution of a contract containing an arbitration clause that expressly provided for judicial enforcement. The contract had been approved by the Hopland tribal council. However, the Hopland tribal council, unlike the Tribal Council here, had authority to waive the tribe's sovereign immunity. The case does not support the broad proposition asserted by Lobo Gaming that the power to contract includes the power to waive sovereign immunity.

The Tribe relies on applicable California case law as well. In *Hydrothermal, supra, 170 Cal. App. 3d 489,* **[*13]** the Court of Appeal reversed the confirmation of an arbitration award against the Fort Bidwell Indian Community Council because the tribe had not waived its sovereign immunity. The chairperson of the tribal council, who was also the chief executive officer, purportedly waived immunity by accepting the jurisdiction of an arbitrator. As in *World Touch Gaming* and *Danka Funding*, the court found the waiver had not been authorized by tribal law. Ignoring the equities involved, the court concluded the state lacked subject matter jurisdiction.

Lobo Gaming contends that these cases do not apply. According to Lobo Gaming, in *World Touch Gaming*, *Danka Funding*, and *Hydrothermal*, a mere official of each tribe attempted to waive immunity, but in each case that official had no authority to execute a waiver on behalf of the tribe. In this case, Lobo Gaming argues, the Tribal Council, not an official, executed a contract,

an act it was expressly empowered to perform under tribal law. Since the Tribal Council has the constitutional authority to enter contracts and to manage the economic affairs of the Tribe, unlike the officials in these cases, it had the authority to agree to enforceable **[*14]** remedies contained within the contract. We disagree.

The significance of *World Touch Gaming*, *Danka Funding*, and *Hydrothermal* was not who waived tribal immunity, but whether the waiver was authorized by tribal law. In each case, the court found the waiver had not been executed by those with the constitutional power to act on behalf of the tribe. The same is true here. The language used to reserve the power to waive sovereign immunity to the tribal membership is clear and unequivocal. The Tribal Council was not constitutionally authorized to waive immunity. Hence, *World Touch Gaming*, *Danka Funding*, and *Hydrothermal* are precisely on point. A waiver, no matter how clearly and unequivocally expressed, is ineffective if it transgresses tribal law.

Lobo Gaming resorts to hyperbole, insisting that a failure to find the power to waive immunity implicit in the power to contract will dampen, if not destroy, business opportunities on Indian reservations. No one, according to Lobo Gaming, will contract with a tribe without enforceable remedies. With such dire consequences looming, Lobo Gaming maintains that the only reasonable interpretation of the Tribal Constitution **[*15]** is to conclude that the power to contract means the power to waive sovereign immunity. And that power resides with the Tribal Council.

We, of course, are not the chamber of commerce. Our role is not to supplant the Tribe's assessment of its business risks and opportunities with our own. Our role is more humble and straightforward. We must construe

the express language of the Tribal Constitution with the aid of state and federal law protecting the sovereignty of federally recognized Indian tribes.

Nor are we persuaded that the Tribal Council's inability to waive immunity renders its power to contract a nullity. In *Oklahoma Tax Com., supra, 498 U.S. 505*, the Supreme Court held that the tribe's sovereign immunity precluded the State of Oklahoma from collecting cigarette sales tax from tribal members who purchased their cigarettes in a tribal store on land held in trust by the federal government for the tribe. The court rejected the state's argument, similar to the argument advanced by Lobo Gaming, that they had the right to collect from nonmembers without any remedy. Rather, the court stated, Oklahoma had a variety of alternative remedies, and if those failed, it **[*16]** could pursue appropriate legislation from Congress. (*Id. at p. 514.)*

The Tribe suggests that Lobo Gaming also has alternative remedies, even if they are not as desirable as litigation. The Tribe suggests that the general membership's retained power to waive sovereign immunity does not preclude the Tribal Council from contractually agreeing to other remedies that do not involve an immunity waiver, such as authorizing prospective injunctive relief against tribal officials, escrowing tribal collateral, nonbinding arbitration, or mediation. Again, we need not assess the relative value of the remedies. The question posed is whether the inability to sue in the absence of a waiver of immunity by the tribal membership renders our interpretation of the Tribal Constitution absurd or unreasonable. We conclude it does not. While the possibility of other remedies, like the court alluded to in *Oklahoma Tax Com., supra*, 498 U.S. 505, does mean the power to contract is not a nullity without the power to sue, we are

more persuaded by the clarity of the express language used in the Tribal Constitution to reserve the power to waive immunity to the tribal membership. Given the [*17] strong tradition in state and federal law to honor a tribe's prescription of how immunity must be waived, we find that the Tribal Constitution's clear reservation of the power to waive trumps any collateral restriction on the power to contract. **n2**

> **n2** The parties exchange factual allegations on the merits of the underlying dispute. These allegations are irrelevant to the legal issue presented.

Undeterred by the formidable law against it, Lobo Gaming turns our attention to a single word, convinced that a sole adjective is the key to harmonizing the Tribal Constitution, rendering the waiver effective, and conferring jurisdiction on the courts of California. The adjective is "unconsented"; the context is the Tribe's reservation of the right to waive sovereign immunity to "unconsented suit."

Lobo Gaming argues that the phrase "unconsented suit" in article VII, section 3 of the Tribal Constitution recognizes that the power of the Tribal Council to enter into contracts pursuant to article VII, section [*18] 1 includes the authority to provide for enforceable remedies in the event of a breach of contract. In other words, "unconsented suit" is a lawsuit not consented to by the Tribal Council by contract pursuant to its power under article VII, section 1. Lobo Gaming insists that we must construe each and every term used in the Tribal Constitution, and by interpreting "unconsented" to mean those suits in which the Tribal Council has not

contractually agreed to waive immunity, section 1 and section 3 can be harmonized.

The Tribe's response is twofold. First, "unconsented" routinely modifies "suit" to underscore the self-evident notion that immunity is only pertinent where the sovereign does not consent to being sued. Second, and more importantly according to the Tribe, reliance on this lone adjective does not overcome the absence of any express language in the Tribal Constitution vesting the Tribal Council with the power to waive immunity. In order for "unconsented suit" to mean "unless the Tribal Council contractually agreed to be sued," there would have to be language somewhere in the Tribal Constitution vesting the Tribal Council with the power to waive the Tribe's sovereign immunity. **[*19]** We agree with the Tribe.

The Tribal Constitution expressly reserves the power to waive immunity to the tribal membership. Although the Tribal Constitution confers a long list of powers on the Tribal Council, nowhere does it give the Tribal Council the authority to waive sovereign immunity. To suggest, as Lobo Gaming does, that the power to waive sovereign immunity is "a part of" the power to contract is to conjure a power out of thin air.

And hence, Lobo Gaming's argument comes full circle. Waivers of sovereign immunity cannot be implied, nor can the power to waive immunity. We cannot accept Lobo Gaming's far- fetched notion that under the guise of harmonizing every term the express reservation of the power to waive immunity to the tribal membership gives way to an implied power to waive immunity to the Tribal Council.

Finally, and briefly, we reject Lobo Gaming's contention that if all contractual remedies fail, it is entitled to an equitable estoppel. Sovereign immunity is

a question of jurisdiction, not equity. (*Puyallup, supra*, 433 U.S. at pp. 172-173.) "Sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending upon the equities of **[*20]** a given situation." (*Chemehuevi Ind. Tribe v. Cal. St. Bd. of Equal. (9th Cir. 1985) 757 F.2d 1047, 1052-1053, fn. 6,* revd. in part on other grounds *(1985) 474 U.S. 9.)* Thus, tribal immunity may not be defeated even where its assertion may "unfairly deprive contracting parties of the benefit of their bargains." (*Amer. Indian Agr. Credit v. Stand. Rock Sioux Tribe (8th Cir. 1985) 780 F.2d 1374, 1379.)*

DISPOSITION

The order is affirmed.

RAYE, J.

We concur:

DAVIS, Acting P.J.

MORRISON, J.

140106

SUPERIOR COURT OF THE STATE OF CALIFORNIA SHASTA COUNTY

LOBO GAMING, INC., a New Mexico Corporation, Plaintiff,

v.

PIT RIVER TRIBE OF CALIFORNIA, a federally recognized Indian Tribe and PIT RIVER GAMING COMMISSION, an agency of the Pit River Tribe, Defendants

January 26, 2001, Filed

This matter came on regularly for hearing on the motion of specially appearing defendants to quash service of summons for lack of jurisdiction pursuant to Code of Civil Procedure section 418.10(a)(1). After consideration of the briefs and all other matters presented to the Court, the Court orders as follows:

It is hereby ordered that all requests for judicial notice are granted, except plaintiff's request as to the unpublished decision, which is denied.

It is further ordered that specially appearing defendants are entitled to sovereign immunity in matters of commerce including contracting .Defendant Tribe's Constitution, Art. Sec 1, confers on the Tribal council power to contract, but Art VII, Sec. 3a reserves to the Tribe power "...to waive sovereign immunity of the Tribe to unconsented suite." Plaintiff has failed to establish that the tribe waived its immunity, and has

therefore failed to establish this Court has jurisdiction over the defendants. The motion to quash is GRANTED.

S107517

IN THE SUPREME COURT OF CALIFORNIA,

En banc

LOBO GAMING, INC.,
Plaintiff and Appellant,

v.

PIT RIVER TRIBE OF CALIFORNIA et al.,
Defendants and Respondents.

August 14, 2002, Filed

Petition for review denied.